

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MEGAN HANFORD,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 2:16-cv-00921 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 4; Consent to Proceed Before a United States Magistrate Judge, Dkt. 5). This matter has been fully briefed (*see* Dkt. 10, 11, 12).

After considering and reviewing the record, the Court concludes that the ALJ erred when failing to credit fully the opinions from plaintiff's treating cardiologist, Dr. Stout, and failing to give such opinions controlling weight. Although the ALJ found that

1 the opinion of a limitation on standing/walking for less than two hours in an eight hour
2 workday with unscheduled, intermittent 10 minute breaks is inconsistent with plaintiff's
3 reports throughout the treatment record, the ALJ failed to cite to any evidence in the
4 treatment record demonstrating that plaintiff was capable of standing or walking for two
5 or more hours in a work day without intermittent breaks. Similarly, although the ALJ
6 found insufficient evidence supporting Dr. Stout's opinion that plaintiff suffered from
7 symptoms of arrhythmia, plaintiff's arrhythmias are documented regularly throughout the
8 treatment record.

9
10 Plaintiff's claim was filed in 2007 and the Administration has had three attempts
11 to adjudicate this claim. For this reason, based on the record as a whole, and because the
12 treatment record demonstrates that the ALJ would be required to find plaintiff disabled
13 on remand if Dr. Stout's opinions are credited-in-full, the Court concludes that this matter
14 is reversed pursuant to sentence four of 42 U.S.C. § 405(g) and that the matter is
15 remanded to the Administration with a direction to find that plaintiff is disabled and to
16 award benefits.

17 BACKGROUND

18 Plaintiff, MEGAN HANFORD, was born in 1984 and was 22 years old on the
19 alleged date of disability onset of March 1, 2007 (*see* AR. 158-67). Plaintiff has a high
20 school diploma and completed two years of community college (AR. 1202-03). Plaintiff
21 has work history as a retail store manager, but quit after she had surgery (AR. 1203).

22 According to the ALJ, plaintiff has at least the severe impairments of "congenital
23 aortic stenosis, status-post multiple aortic valve replacements, status-post pacemaker
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1 placement in 2004, and aortic aneurysm repair in March of 2007; residual cognitive
2 effects status-post left frontal cerebrovascular accident; residual right-sided
3 diaphragmatic paralysis; depression; anxiety; and obesity (20 CFR 404.1520(c))” (AR.
4 1148).

5 At the time of the hearing, plaintiff was living with her husband (*see* AR. 1295).

6 PROCEDURAL HISTORY

7 Plaintiff’s application for disability insurance benefits (“DIB”) pursuant to 42
8 U.S.C. § 423 (Title II) of the Social Security Act was denied initially and following
9 reconsideration (*see* AR. 107-09, 111-12). Plaintiff has provided an uncontested
10 procedural history as follows:
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12 Plaintiff filed an application for disability insurance benefits on July 19,
13 2007 alleging disability beginning March 1, 2007, and with a date last insured
14 of June 30, 2010. Tr. 158. Plaintiff’s claim was denied initially and on
15 reconsideration. Tr. 107, 111. The first ALJ to consider Plaintiff’s claim issued
16 a partially favorable decision finding that Plaintiff’s chronic pulmonary
insufficiency satisfied a listed impairment until March 27, 2008. Tr. 1357. This
Court remanded Plaintiff’s claim to the Commissioner pursuant to a stipulated
motion. Tr. 1381.

17 A second ALJ issued a decision denying Plaintiff’s claim on October 24,
18 2012. Tr. 1406- 30. Plaintiff requested review, and the Appeals Council
granted Plaintiff’s request for review on July 28, 2014. Tr. 1431-37. The
Appeals Council remanded Plaintiff’s claim. Tr. 1435.

19 ALJ Cynthia D. Rosa held a third hearing on January 21, 2015. Tr. 1193.
20 The ALJ issued another decision denying Plaintiff’s claim on May 29, 2015.
21 Tr. 1142-92. The Appeals Council denied Plaintiff’s request for review on
April 11, 2016 (Tr. 1137-41), making the ALJ decision the Commissioner’s
final decision.

22 (Dkt. 10, p. 2).
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1 In plaintiff's Opening Brief, plaintiff raises the following issue: Whether or not
 2 the ALJ provided clear and convincing reasons supported by substantial evidence in the
 3 record for rejecting the opinion of Dr. Karen Stout, M.D., plaintiff's treating cardiologist,
 4 who assessed limitations inconsistent with the ability to perform any work in the national
 5 economy (*see* Dkt. 10, p. 1).

6 STANDARD OF REVIEW

7 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
 8 denial of social security benefits if the ALJ's findings are based on legal error or not
 9 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
 10 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
 11 1999)).
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13 DISCUSSION

14 **Whether or not the ALJ provided clear and convincing reasons supported by**
 15 **substantial evidence in the record for rejecting the opinion of Karen Stout,**
 16 **M.D., plaintiff's treating cardiologist, who assessed limitations inconsistent**
 17 **with the ability to perform any work in the national economy.**

18 Plaintiff contends that the ALJ erred by failing to credit fully and give controlling
 19 weight to the opinions of plaintiff's treating cardiologist (Dkt. 10, pp. 5-18). Defendant
 20 contends that there is no harmful error and that the ALJ's decision is based on substantial
 21 evidence in the record as a whole (Dkt. 11).

22 "A treating physician's medical opinion as to the nature and severity of an
 23 individual's impairment must be given controlling weight if that opinion is well-
 24 supported and not inconsistent with the other substantial evidence in the case record."

1 *Edlund v. Massanari*, 2001 Cal. Daily Op. Srv. 6849, 2001 U.S. App. LEXIS 17960 at
2 *14 (9th Cir. 2001) (citing SSR 96-2p, 1996 SSR LEXIS 9); *see also Smolen v. Chater*,
3 80 F.3d 1273, 1285 (9th Cir. 1996).

4 The ALJ must provide “clear and convincing” reasons for rejecting the
5 uncontradicted opinion of a treating physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th
6 Cir. 1996) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*,
7 908 F.2d 502, 506 (9th Cir. 1990)). But when a treating physician’s opinion is
8 contradicted, that opinion can be rejected “for specific and legitimate reasons that are
9 supported by substantial evidence in the record.” *Lester, supra*, 81 F.3d at 830-31 (citing
10 *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d
11 499, 502 (9th Cir. 1983)). The ALJ can accomplish this by “setting out a detailed and
12 thorough summary of the facts and conflicting clinical evidence, stating h[er]
13 interpretation thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th
14 Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

15 Plaintiff was born in 1984 and was diagnosed with congenital aortic stenosis as an
16 infant (*see* AR. 1724). Throughout her life, plaintiff has had a number of surgeries
17 including a surgical valvotomy as an infant, and aortic valve replacement in 1999, then
18 aortic enlargement surgery in 2000, and another aortic valve replacement in 2004 (AR.
19 387, 1724). After her 2004 surgery, plaintiff had a pacemaker placed (AR. 387). Prior to
20 2007, plaintiff worked as a retail sales associate and retail sales manager (*see* Dkt. 10, p.
21 2).
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1 In March 2007, plaintiff was diagnosed with an abdominal aortic aneurysm (AR.
2 392). Plaintiff underwent surgery to resect the aneurysm on March 14, 2007 (AR. 390).
3 As a result of her surgery and resulting complications, plaintiff suffered an anoxic event,
4 confirmed subsequently by imaging as a stroke, and also suffered a seizure (*see* AR. 386,
5 390, 459, 693, 706). Plaintiff was in the hospital over 70 days, and her recovery was
6 complicated by acute kidney failure requiring dialysis, abdominal infection from her
7 feeding tube, and difficulty breathing, and ultimately was diagnosed with bilateral
8 diaphragmatic paralysis, requiring prolonged ventilation (*see* AR. 267, 309, 380, 608,
9 696, 702, 707, 709, 728, 730, 732).

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11 On October 14, 2009, plaintiff's treating cardiologist, Dr. Karen Stout, M.D.,
12 indicated that plaintiff suffered from fatigue as a result of all of her conditions, primarily
13 her diaphragmatic paralysis and obesity, and opined that plaintiff would be limited to
14 standing/walking less than two hours in an eight-hour workday and would require several
15 unscheduled 10 minute breaks during the workday (AR. 979). Dr. Stout also opined that
16 plaintiff's conditions likely would result in good and bad days, which would cause
17 plaintiff to be absent from work for 3 to 4 days per month (*see id.*).

18 On September 17, 2010, Dr. Stout submitted another letter, indicating that three
19 separate exercise tests objectively documented plaintiff's "significant physical
20 limitations" (AR. 1136). According to this letter, plaintiff had undergone two treadmill
21 stress tests and cardiopulmonary exercise tolerance test ("CPET"), all of which indicated
22 a lack of stamina (*see id.*). These objective tests render Dr. Stout's opinions well
23 supported. As noted by Dr. Stout, on "the treadmill tests, plaintiff's functional aerobic
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1 impairment (FAI) scores were +37% and +35% respectively, [whereas] the usual
2 reported range is -20% to +20% thus, plaintiff was well outside the usual range,
3 with clearly poor exercise capacity” (*id.*). Similarly, on the CPET, plaintiff’s “maximum
4 VO2/kg score of 14.5 was only 46% of predicted” (*id.*).

5 On January 13, 2015, Dr. Stout provided another clarification of her previous
6 opinions (*see* AR. 2193-2201). Dr. Stout indicated that plaintiff continued to experience
7 fatigue as a result of her combination of impairments (AR. 2199). She indicated that
8 plaintiff “continues to have symptoms of arrhythmia, which can lead to fatigue” (*id.*). Dr.
9 Stout opined that plaintiff should be “allowed to work in a sitting capacity with frequent
10 breaks” (*id.*). She opined that plaintiff could stand/walk for less than two hours in an
11 eight-hour workday as a result of her surgical repairs, with the ability to rest as needed
12 and that plaintiff would have 3 to 4 absences per month based on the ups and downs that
13 she experienced as a result of her cardiac symptoms (*id.*).

14 The ALJ failed to credit fully Dr. Stout’s opinion and did not give it controlling
15 weight (AR. 1174). Specifically, the ALJ rejected Dr. Stout’s opinion that plaintiff would
16 be limited to less than two hours of standing/walking per work day, with several
17 unscheduled 10 minute breaks, on the basis that “the record includes no
18 recommendations or warnings by that doctor or any other to limit her standing/walking,”
19 and that Dr. Stout’s colleagues recommended that plaintiff be more active and exercise
20 more (AR. 1174). The fact that there are no warnings in the record for plaintiff to limit
21 her standing/walking is not inconsistent with Dr. Stout’s opinion that plaintiff’s
22 functional ability consists of less than two hours per day of standing/walking during an
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1 eight-hour work day, with several breaks. Nor is it inconsistent with Dr. Stout's opinion
2 that plaintiff would be absent from work 3 to 4 days per month. Similarly,
3 recommendations that plaintiff be more active and exercise more are not inconsistent
4 with the opined limitations. This is especially the case where the record demonstrates that
5 although plaintiff was encouraged to exercise in order to lose weight, plaintiff was
6 "having a hard time with weight loss because she cannot tolerate much exercise, and Dr.
7 Stout has talked to her about not pushing her exercise too vigorously" (AR. 945).
8 Similarly, the record reflects that plaintiff "walks approximately 15-20 minutes on flat
9 surfaces twice a day and states that she can do this without difficulty; however, she does
10 not go further because she feels that her heart speeds up and does not know if this is
11 okay" (AR. 965). The record also reflects that plaintiff was "limited in exercise activity
12 by heart rate goal set by her cardiologist, Dr. Stout, at 120" (AR. 1028). The record
13 reflects that this heart rate goal "limits [plaintiff] to very little activity through the day"
14 (*id.*). Therefore, the fact that it was recommended to plaintiff that she exercise more does
15 not demonstrate any inconsistency with Dr. Stout's opinion that plaintiff was limited to
16 less than two hours of standing/walking in an eight hour workday with several
17 intermittent 10 minute breaks and that she would be absent from work 3 to 4 days per
18 month.
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20 The ALJ also noted that plaintiff asserted a 30 pound weight limit, but Dr. Stout
21 did not mention any restriction and lifting/carrying (*see id.*). However, this also does not
22 demonstrate any inconsistency with Dr. Stout's opinion. At most, this is a reason not to
23 credit plaintiff's assertion that she had a lifting limitation of 30 pounds: it is not a
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1 legitimate reason for the failure to credit fully the opinion from plaintiff's treating
2 cardiologist regarding standing and walking, the need for breaks and likely absences.

3 The ALJ also found that Dr. Stout's opinion regarding the standing/walking
4 limitation with unscheduled, intermittent breaks is inconsistent with plaintiff's testimony
5 that she could not be on her feet for two hours without being able to sit "for a little bit in
6 between" (*see id.*). However, this finding by the ALJ is not based on substantial evidence
7 in the record. Plaintiff did not testify that she could stand daily for two or more hours
8 during an eight-hour workday in the context of full time employment without several
9 daily unscheduled 10 minute breaks, as found by the ALJ (*see AR. 1153-54*). The
10 testimony referred to by the ALJ occurred at the August 2012 hearing (*see AR. 1261*).
11 The ALJ asked plaintiff "do you think you could be on your feet for two hours at any
12 given time?" (*id.*). Plaintiff replied "probably not without sitting down for at least a little
13 bit in between" (*id.*). The ALJ's finding that plaintiff's testimony is inconsistent with Dr.
14 Stout's opinion is not based on substantial evidence in the record as a whole.
15

16 "Substantial evidence" is more than a scintilla, less than a preponderance, and is such
17 "relevant evidence as a reasonable mind might accept as adequate to support a
18 conclusion.'" *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (quoting *Davis v.*
19 *Heckler*, 868 F.2d 323, 325-26 (9th Cir. 1989)). Plaintiff's indication that she could not
20 stand for two hours at a time without sitting in between is not sufficient relevant evidence
21 to allow a reasonable mind to accept the finding that Dr. Stout's opinion that plaintiff
22 could stand/walk less than two hours in an eight-hour workday with several unscheduled
23 10 minute breaks is inconsistent with plaintiff's testimony. *See id.* This is especially the
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1 case given the context of plaintiff's testimony surrounding this question, where plaintiff
2 was asked how long she could stand at one time and she testified that she could not put an
3 exact time on it, but that sometimes, "it can be 10 minutes, sometimes it can be 15
4 minutes, 20 minutes" (AR. 1261). Furthermore, plaintiff's testimony is completely
5 consistent with Dr. Stout's opinion that plaintiff would require several unscheduled
6 breaks lasting 10 minutes during an eight-hour workday, an opinion that is not
7 inconsistent with any evidence in the record cited by the ALJ.

8
9 The ALJ also relied on a finding that Dr. Stout's opinion was inconsistent with
10 plaintiff's reports in the medical record. However, nothing in plaintiff's reports is
11 inconsistent with Dr. Stout's opinions. For example, as noted by defendant, plaintiff
12 reported that she was walking a few miles a day; doing usual housework; sleeping well;
13 only rarely taking naps; and experiencing no difficulty with somnolence during the day
14 (Dkt. 11, p. 6 (citing AR. 907)). Plaintiff also reported that she felt almost back to her
15 usual level of good health and denied fatigue, shortness of breath, or chest pain (*id.*
16 (citing AR. 524)). However, once again, none of these reports by plaintiff demonstrates
17 inconsistency with the opinion from Dr. Stout. For example, neither the ALJ, nor
18 defendant, sites to any evidence in the record that it took plaintiff more than two hours to
19 walk a few miles, or that she did so without intermittent 10 minute breaks. In fact,
20 plaintiff's report about these activities demonstrates that she needed regular breaks. In
21 July, 2007, plaintiff indicated that she was able to walk for a few hours around the mall
22 "with breaks in between" (AR. 660). This does not demonstrate any inconsistency with
23 the opinion from Dr. Stout that plaintiff was limited to standing/walking less than two
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1 hours during work days in a full-time work setting and needed intermittent breaks.

2 Although defendant noted that plaintiff reported shopping, plaintiff indicated that she

3 conducted this activity about “once or twice a week for about an hour or two hours” (AR.

4 193). Conducting an activity once or twice a week for a couple of hours is very different

5 from conducting that same activity every day, five days a week in a work setting, where

6 unscheduled intermittent breaks are not tolerated, as testified to by the Vocational Expert

7 at plaintiff’s hearing, as will be discussed further below, *see infra*. In fact, plaintiff’s

8 reports of requiring breaks in between her walking through the mall support Dr. Stout’s

9 opinion. Similarly, the fact that plaintiff was doing housework, cooking dinner, and

10 feeding her animals, does not demonstrate any inconsistency, as the ALJ does not cite

11 any evidence that plaintiff was standing/walking more than two hours in the span of a

12 workday without regular 10 minute breaks to accomplish these activities. *See, e.g.,*

13 *Smolen v. Chater*, 80 F.3d , 1273, 1287 n.7 (9th Cir. 1996) (“The Social Security Act

14 does not require that claimants be utterly incapacitated to be eligible for benefits, and

15 many home activities may not be easily transferable to a work environment where it

16 might be impossible to rest periodically or take medication.” (citation omitted in

17 original)); *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (“[M]any home activities are

18 not easily transferable to what may be the more grueling environment of the workplace,

19 where it might be impossible to periodically rest or take medication”). Similarly,

20 although at a particular visit, plaintiff denied shortness of breath or chest pain, this was in

21 the context of minimal activities, and not when she was attempting to stand or walk for

22 two or more hours daily during a work week without several 10 minute daily breaks (*see*

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1 AR. 525). In fact, plaintiff reported concerns simply about driving at this time, but was
2 advised that she could resume driving, and that she could “resume as much of her
3 previous activities as tolerated” (*see id.*). Similarly, although defendant cites to plaintiff’s
4 function report from August, 2007, where plaintiff reported that plaintiff shopped at the
5 mall, went to movies, and visited with friends, plaintiff’s function report indicates that
6 she could “not shop at mall for long without having to rest or leave during shopping”
7 (AR. 194).

8
9 Nothing cited by the ALJ or defendant demonstrates that plaintiff could stand or
10 walk for two or more hours in a work day without taking several intermittent 10 minute
11 breaks. There is no inconsistency with Dr. Stout’s opinion.

12 The ALJ also indicated that she did not find sufficient support for the opinion from
13 Dr. Stout that plaintiff “continues to have symptoms of arrhythmia, which can lead to
14 fatigue” (AR. 1175 (citing AR. 2193); *see also* AR. 2199). However, as noted by
15 plaintiff, “during some of plaintiff’s heart-monitoring tasks, she did, in fact, experience
16 arrhythmias, which were objectively documented” (Dkt. 10, p. 16 (citing AR. 278
17 (tachycardia in May 2007), 309 (tachycardic throughout hospital course), 924 (brisk
18 tachycardia during treadmill stress test of November 2008), 1059 (brief periods of
19 tachycardia during sleep study in December 2009))). Although there were occasions
20 during which plaintiff was not contemporaneously suffering from an arrhythmia, such
21 does not mean that plaintiff was not having symptoms of arrhythmia, as clearly she was
22 demonstrating such symptoms regularly. As argued by plaintiff, the “ALJ’s apparent
23 disbelief of Dr. Stout’s opinion was akin to concluding that an individual with a seizure
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1 disorder did not actually experience seizures because they did not have a seizure on every
2 occasion that they were examined by their doctor” (Dkt. 10, p. 16). Perhaps the ALJ was
3 unclear about the definition of arrhythmia; however, regardless, the finding by the ALJ
4 that there was insufficient evidence of such is not based on substantial evidence in the
5 record as a whole. *See Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990) (“judges,
6 including administrative law judges of the Social Security Administration, must be
7 careful not to succumb to the temptation to play doctor. The medical expertise of the
8 Social Security Administration is reflected in regulations; it is not the birthright of the
9 lawyers who apply them. Common sense can mislead; lay intuitions about medical
10 phenomena are often wrong”) (internal citations omitted)); *see also, e.g.*, the Texas Heart
11 Institute, “Categories of Arrhythmias,” available at
12 <http://www.texasheart.org/HIC/Topics/Cond/arrhycat.cfm>, last visited 12/20/2016
13 (“arrhythmias are generally divided into two categories: ventricular and supraventricular.
14 . . . The irregular beats can either be too slow (bradycardia) or too fast (tachycardia)).

15
16 For the reasons stated, the Court concludes that the ALJ failed to offer even
17 specific and legitimate reasons supported by substantial evidence in the record as a whole
18 for failing to credit fully the medical opinion of plaintiff’s treating cardiologist, Dr. Stout.
19 Plaintiff argues that clear and convincing reasons must be supplied for the ALJ’s
20 rejection of Dr. Stout’s opinions, as only the non-examining source opinions differed and
21 the opinion of a non-examining doctor does not alone constitute substantial evidence
22 justifying the rejection of the opinion of a treating physician (*see* Dkt. 10, p. 6 (quoting
23 *Hill v. Astrue*, 698 F.3d 1153, 1160 (9th Cir. 2012)). In addition, the ALJ did not cite any
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1 evidence from the record that is inconsistent with some of the opinions of Dr. Stout, such
2 as the need for several daily 10 minute breaks. However, as the Court has concluded that
3 the ALJ's reasoning is not even specific and legitimate, these other issues do not need to
4 be decided. Dr. Stout's opinion that plaintiff required several unscheduled 10 minute
5 breaks daily, an opinion that the ALJ rejected, is completely consistent with the record as
6 a whole. Dr. Stout's opinion that plaintiff could stand/walk less than two hours a work
7 day, required several 10 minute daily breaks and would be absent 3 to 4 days a month is
8 well-supported and not inconsistent with substantial evidence in the record as a whole,
9 thus the opinion should have been given controlling weight, as discussed further below.
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11 Furthermore, the ALJ's failure to credit fully Dr. Stout's opinion is not harmless.

12 The Ninth Circuit has "recognized that harmless error principles apply in the
13 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
14 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
15 Cir. 2006) (collecting cases)). Recently the Ninth Circuit reaffirmed the explanation in
16 *Stout* that "ALJ errors in social security are harmless if they are 'inconsequential to the
17 ultimate nondisability determination' and that 'a reviewing court cannot consider [an]
18 error harmless unless it can confidently conclude that no reasonable ALJ, when fully
19 crediting the testimony, could have reached a different disability determination.'" *Marsh*
20 *v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. July 10, 2015) (citing *Stout*, 454 F.3d at 1055-
21 56).
22

23 Here, the ALJ failed to credit fully various opinions from Dr. Stout regarding
24 plaintiff's functional limitations, such as her standing/walking limitation, that plaintiff

1 would need several unscheduled 10 minute breaks during an eight-hour workday and
2 would be absent from work 3 to 4 days per month. The ALJ also failed to include these
3 limitations into the assessment regarding plaintiff's residual functional capacity ("RFC")
4 and failed to include these limitations into the hypothetical presented to the vocational
5 expert ("VE"), upon which the ALJ relied when making her step five finding that there
6 were jobs existing in significant numbers in the national economy plaintiff could
7 perform, and when making her ultimate determination regarding non-disability.
8 Therefore, the Court cannot conclude with confidence that "no reasonable ALJ, when
9 fully crediting the testimony, could have reached a different disability determination."
10 *Marsh*, 792 F.3d at 1173 (citing *Stout*, 454 F.3d at 1055-56).

12 Generally, when the Social Security Administration does not determine a
13 claimant's application properly, "the proper course, except in rare circumstances, is to
14 remand to the agency for additional investigation or explanation." *Benecke v. Barnhart*,
15 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit has put
16 forth a "test for determining when [improperly rejected] evidence should be credited and
17 an immediate award of benefits directed." *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th
18 Cir. 2000) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)).

19 It is appropriate when:

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21 (1) the ALJ has failed to provide legally sufficient reasons for rejecting
22 such evidence, (2) there are no outstanding issues that must be resolved
23 before a determination of disability can be made, and (3) it is clear from
24 the record that the ALJ would be required to find the claimant disabled
were such evidence credited.

Harman, supra, 211 F.3d at 1178 (quoting *Smolen, supra*, 80 F.3d at 1292).

1 Regarding step one, the Court already has concluded that the ALJ failed to provide
2 legally sufficient reasons for failing to credit fully the opinions of plaintiff's treating
3 cardiologist, Dr. Stout.

4 Regarding step two, the Court notes that the *Garrison* Court found that "the
5 district court abused its discretion by remanding for further proceedings where the credit-
6 as-true rule is satisfied and the record afforded no reason to believe that [the claimant] is
7 not, in fact, disabled." *Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014) (footnote
8 omitted). The court noted that simply providing an ALJ with another opportunity to reject
9 evidence is not proper, and concluded as follows:
10

11 Although the Commissioner argues that further proceedings would serve
12 the "useful purpose" of allowing the ALJ to revisit the medical opinions
13 and testimony that she rejected for legally insufficient reasons, our
14 precedent and the objectives of the credit-as-true rule foreclose the argument
15 that a remand for the purpose of allowing the ALJ to have a mulligan
16 qualifies as a remand for a "useful purpose" under the [second] part of the
17 credit-as-true analysis. (Citations to *Benecke*, 379 F.3d at 595 ("Allowing
18 the Commissioner to decide the issue again would create an unfair 'heads
19 we win; tails, let's play again' system of disability benefits adjudication.");
20 *Moisa v. Barnhart*, 367 F.3d 882, 887 (9th Cir. 2004) ("The Commissioner,
21 having lost this appeal, should not have another opportunity to show that
22 Moisa is not credible any more than Moisa, had he lost, should have an
23 opportunity for remand and further proceedings to establish his credibility."
24 (citation omitted))).

19 *Id.* at 1021-22.

20 Here, there have been three attempts by administrative law judges to adjudicate
21 plaintiff's claim, which was filed in July 2007 (*see* AR. 1145). After the first such
22 attempt by ALJ Alexis, the matter was reversed and remanded from this Court based on
23 stipulation; after the second attempt by ALJ Ross, the Appeals Council accepted review
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1 and remanded the case; and, after the third attempt by the ALJ herein, this Court has
2 concluded that yet again, the Administration has failed to adjudicate properly plaintiff's
3 claim (*see id.*). There is no "useful purpose" here in allowing an ALJ to revisit this case
4 again, unless there are outstanding issues that must be resolved before a determination of
5 disability can be made. *See Harman, supra*, 211 F.3d at 1178 (quoting *Smolen, supra*, 80
6 F.3d at 1292); *see also Garrison*, 759 F.3d at 1021-22. Based on the record as a whole,
7 including the ALJ's decision and the testimony from the VE, as discussed further below,
8 the Court concludes that there are no outstanding issues that must be resolved before a
9 determination of disability can be made.
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11 Regarding step three, the Court must determine if it is clear from the record that
12 the ALJ would be required to find plaintiff disabled if the opinion of her treating
13 cardiologist, Dr. Stout, is credited. As already noted when discussing the objective
14 medical evidence, Dr. Stout's opinion is well supported, *see supra* (citing AR. 1136).
15 Therefore, as Dr. Stout's opinion is well-supported by objective medical evidence and not
16 inconsistent with other substantial evidence in the record, her opinion should have been
17 afforded controlling weight. *See Edlund v. Massanari*, 2001 Cal. Daily Op. Svc. 6849,
18 2001 U.S. App. LEXIS 17960 at *14 (9th Cir. 2001) (citing SSR 96-2p, 1996 SSR
19 LEXIS 9) ("A treating physician's medical opinion as to the nature and severity of an
20 individual's impairment must be given controlling weight if that opinion is well-
21 supported and not inconsistent with the other substantial evidence in the case record");
22 *see also Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996).
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1 Testimony by two different VEs demonstrates that if the opinions of Dr. Stout are
2 credited in full, plaintiff is disabled. One VE testified in August, 2012 that if an
3 individual with an RFC similar to that determined for plaintiff would need to take several
4 unscheduled breaks, lasting 10 minutes, during an eight-hour day, that would prevent her
5 from sustaining work activity (*see* AR. 1275). This earlier VE's testimony also indicates
6 that if plaintiff were to be absent from work 3 to 4 days a month on a regular basis as a
7 result of her impairments or treatment, such would prevent her from sustaining work
8 activity (*see id.*). The ALJ did not cite to any evidence inconsistent with Dr. Stout's
9 opinion that plaintiff would need several 10 minute unscheduled breaks or would be
10 absent from work 3 to 4 days a month on a regular basis (*see* AR. 979).
11

12 Similarly, a second VE testified in January, 2015, that if plaintiff were to have
13 more than one day a month of absenteeism, such would not be tolerated by employers
14 (AR. 1227). This same VE testified that if plaintiff had to take a 10 minute rest break
15 once a day in addition to regular breaks, such "would not be tolerated" (AR. 979, 1229).

16 Therefore, it is clear from the record that if Dr. Stout's opinions are credited in
17 full, that the ALJ would be required to find plaintiff disabled. Therefore, there is no
18 reason to remand this matter for further administrative proceedings. Instead, on remand,
19 the Administration is directed to find plaintiff disabled and award benefits. *See Harman*,
20 *supra*, 211 F.3d at 1178 (quoting *Smolen, supra*, 80 F.3d at 1292); *see also Garrison*, 759
21 F.3d at 1021-22.
22

23 //

24 //

CONCLUSION

Based on the stated reasons and the relevant record, the Court **ORDERS** that this matter be **REVERSED** pursuant to sentence four of 42 U.S.C. § 405(g) and that the matter be remanded to the Administration with a direction to find that plaintiff is disabled, consistent with this order.

JUDGMENT should be for plaintiff and the case should be closed.

Dated this 22nd day of December, 2016.

A handwritten signature in black ink, appearing to read "J. Richard Creatura", written over a horizontal line.

J. Richard Creatura
United States Magistrate Judge